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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. [redacted] 90

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF A. C. BARTLETT, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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[redacted] PRINTING COMPANY, CHICAGO

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MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

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THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF A. C. BARTLETT, DECEASED.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

In assessing the estate tax involved in this matter the value of certain trust properties was included in the gross estate on the theory that the trusts in question were "created to take effect in possession or enjoyment at or after the death of the decedent."

There was no claim at any time that the trusts or any of them were made in contemplation of death.

There were seven such trusts, and seven counts in the declaration—one for each of the trusts.

The demurrer of the petitioner, the defendant below, was overruled. The defendant stood by her demurrer, and judgment was therefore given for the taxpayer, plaintiff below.

The Circuit Court of Appeals of the Seventh Circuit, on appeal affirmed the action of the lower court. Its written opinion, though not as yet published, is to be found at page 94 of the record before this court.

The synopsis of these trusts, as given by the counsel for the petitioner is, in the main, correct. We wish only to point out, for the purposes of appropriate emphasis, the following basic facts:

The outstanding fact to be noted is that by no one of the five trusts made in 1919 does the grantor retain any interest whatsoever in the income produced by the trust properties. The income goes entirely to the beneficiaries named. In the first trust, the one for Mrs. Bartlett, twenty-four thousand dollars ($24,000) a year was to be paid to her and the balance was to be accumulated until after the death of the grantor. (Trust Art. 3, Par. 1 and 2; Rec., 9.) The income from the other four trusts for the son and daughters of the grantor was in the first place accumulated. (Trust Art. 3; Rec., 29, 38, 48, 58.) But by amendments to the trusts the income thereafter was payable to the beneficiaries as they desired. (Rec., 32, 42, 52, 61.)

In none of these five trusts does the grantor retain any power of revocation. All of them have the same powers with reference to changes and modifications. That is

to say, in the case of Mrs. Bartlett's trust a majority of the children of Mr. Bartlett can make changes provided he consents. (Trust Art. 6, Par. 2; Rec., 12.)

And in the case of the other four trusts changes and modifications may be made by the joint consent of the particular beneficiary and the grantor, but it is to be noted particularly that there is no power of change reserved in the grantor *himself*. The change can only be made by the *combined act* of the grantor and beneficiary. In other words it was a mere veto power.

In short, these powers are to be read in connection with the prime purpose of the grantor in making the trusts (Art. 6, Par. 1; Rec., 12), namely that he did so

> "* * * for the support and maintenance of the beneficiaries."

With that end in mind it is clear that all of these provisions, to use the language of the Circuit Court of Appeals, are

> "* * * reasonable and prudent provisions which in no way affect or defeat the real purposes of the trusts. The settlor, by these reservations took nothing for himself, but each reservation is a pledge on his part of advice and assistance to the trustee for the benefit of the beneficiaries." (Rec., 96.)

As to the trusts created in 1903 and 1909, referred to in the sixth and seventh counts of the declaration, they were completed acts in those years, long before any federal estate tax statute was on the books.

THE POSITION OF THE RESPONDENT.

The position of the respondent is:

I.

AS TO THE FIVE TRUSTS OF 1919.

(A) That they were not within the statutory language "to take effect in possession or enjoyment at or after death," and that the cases of *Coolidge* v. *Nichols*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, construing this very language are decisive of this proposition.

(B) As an additional reason for the conclusion that these trusts were not taxable the respondent submits: that the tax imposed in this case was imposed under the Revenue Law of 1921; that the trusts of 1919 were made before that law was passed; that the provision in the 1921 Act attempting to make that act retroactive as to prior trusts is held unconstitutional in the *Coolidge Case*, *supra*, that there was neither a saving clause with reference to the prior act—the Act of 1919 which was in force when the 1919 trusts were made—nor did the decision of this court in the *Coolidge Case*, that the retroactive provision of the 1921 act was unconstitutional, revive the necessary portion of the 1919 act.

II.

AS TO THE TWO TRUSTS OF 1903 AND 1910.

These trusts were completed acts long before the 1921 or any other act went into effect, and the fact that they contained powers of revocation is no basis for a sound distinction between them and the holding in the *Coolidge Case*.

BRIEF AND ARGUMENT.

I.

A. THE FIVE TRUSTS OF 1919.

Under the cases of *Coolidge* v. *Nichols*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the trusts of 1919 are not within the language of the statute, "take effect in the possession or enjoyment at or after death."

The argument of petitioner with reference to the trusts for 1919 (page 11) is that because the enjoyment of the remaindermen in the trust property is expressly deferred until after the death of the settlor, the trusts are within the language in question.

But that same contention was made by the Internal Revenue Department in the *Shukert Case* above cited, and the holding of this court in that case decided that contention against the petitioner.

In that case the life expectancy of the settlor when he made the trust was only sixteen years, and under the trust neither the income nor the principal came into the possession or enjoyment of the remaindermen or any of the beneficiaries for thirty years. It was contended by the Internal Revenue Department that therefore the trust did not take effect in possession or enjoyment until after the death of the settlor. This court in that case held directly to the contrary.

In the *Coolidge Case* the same contention was advanced on the ground that the Internal Revenue statute, particularly the phrase quoted, was meant to reach and tax testamentary acts, and that the Coolidge trust was

testamentary because the remaindermen received nothing until after the death of the settlor.

The trust in that case provided, in the first instance, that the income was to go to the two settlors. By an amendment made sometime before the death of the survivor of the settlors the income went to the beneficiaries immediately. But at no time was the principal to be received by the remaindermen until the death of the survivor of the settlors.

It was because of this situation that the Internal Revenue Department contended that the trust was testamentary, and therefore taxable. But this court held (*Coolidge Case*, p. 540), that the conveyance in question was in no proper sense testamentary, and bore no substantial relationship to the transfer by death.

The case of *Saltonstall* v. *Saltonstall* (No. 144, U. S.), 48 Sup. Ct. Rep. 225, decided February 20, 1928, is not in point on this inquiry. The Massachusetts statute there involved, as particularly pointed out by this court, was a statute imposing a tax on the privilege enjoyed by the beneficiary of the succession to and enjoyment of property, and was not a tax upon the privilege of the testator of transmitting property. On the other hand, in the *Coolidge Case*, this court held that the statute involved in that case, which is practically the same statute as that involved in the case at bar, was not a succession tax but an excise tax on the privilege of transmitting property at death. (p. 541.)

As was stated in the *Coolidge Case*, and many times before, by this court the tax imposed by this statute is an excise tax on the transfer of his net estate by a decedent. It does not tax the interest to which some person succeeds on death, but the interests which cease by reason of death. (*Coolidge* v. *Nichols*, 274 U. S. 537,

541.) And if there is no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed. *Knowlton* v. *Moore*, 178 U. S. 78.

The decedent in the case at bar at the time of his death had no title or interest in the trust property which he could transmit. In his lifetime he had parted with every vestige of title and interest in the property. He had at death no right or privilege of transmitting the trust property upon which the statute could operate. The trust property was no part of his estate at the time of his death. There was no interest that ceased in him by reason of his death.

Under the terms of the trust agreement the trust came to an end at a certain time after the death of the decedent, but at that time the property did not pass *from the decedent*.

The fact that the trust terminated possibly five years after the death of the grantor, at which time the principal of the trust property changed hands from the trustee to the beneficiaries, does not in the least affect the general principle above set forth, or change the fundamental concept of these trusts. A property or interest may change hands at or after the death of the decedent, but so long as it does not change *from his* hands the transfer is not a testamentary transfer or a transfer of his estate. It is the transfer of an estate *of, from* and *to someone else*. The fixing of the time for the termination of the trust period was simply for the purpose of defining the class of ultimate beneficiaries.

Fidelity Trust Co., Adm. Dolan v. *McCaughn*, 17 Fed. (2nd) 605.

The only answer made by the Internal Revenue Department in the *Coolidge* and *Shukert Cases* to this construction of the act was as follows:

It not only admitted the construction contended for above but based its own argument upon that construction (*Coolidge* v. *Nichols*, 274 U. S. 539), and alleged (Department's Brief in Coolidge Case, October Term, 1926. No. 88, pp. 25, 26) that the tax is an excise imposed not upon the transfer of the statutory gross estate, *but upon the transfer of the decedent's interest in such property as he actually owned at the time of his death.* (Italics ours.) Then, to the obvious proposition that the trust property could not be taxable as it was no part of the decedent's estate at the time of his death, the answer is made that the section in question (Sec. 402) merely provides the *measure of the tax*.

That position was the fundamental position of the Internal Revenue Department urged upon this court in the Shukert and Coolidge Cases. It must meet and answer the same proposition in this case.

The major premise, that the tax is an excise imposed upon the transfer of the decedent's interest in such property as he actually owned at the time of his death, is the correct interpretation of the law, and is as true now as it was at the time that the position was taken by the Department in the Coolidge and Shukert Cases, and is equally applicable to this case, as the decedent had no interest whatsoever in the trust property at the time of his death.

In the brief in support of this petition no answer to this proposition is suggested, and it is submitted that the only possible answer is the one given in the brief of the Department of Internal Revenue in the Shukert and

Coolidge cases, namely, that the tax could be measured by the value of the trust property.

But this court in the *Coolidge Case*, 274 U. S. 539, clearly and definitely repudiates this theory, and comments upon the absurdity to which such a theory would lead. (542)

We urge, therefore, that under the holdings of the *Coolidge* and *Shukert Cases*, in order to tax any transfer by way of trust or otherwise, it must be shown that the property transferred was a part of the decedent's estate at death, and was transferred from him at that time, and that therefore these two cases are decisive of the question involved in the case at bar, as far as the trusts of 1919 are concerned.

B. THE TAX IN THIS CASE IS IMPOSED UNDER THE REVENUE LAW OF 1921.

BUT THE TRUSTS OF 1919 WERE MADE BEFORE THE LAW OF 1921 BECAME EFFECTIVE.

THEREFORE, UNDER THE AUTHORITY OF THE COOLIDGE CASE, DECLARING THE RETROACTIVE PROVISION OF THE STATUTE UNCONSTITUTIONAL, THE BARTLETT TRUSTS OF 1919 ARE NOT TAXABLE.

The Internal Revenue Act of 1921, under which this tax is sought to be collected, repealed the 1918 act which was in force when the Bartlett trusts of 1919 were made.

The 1918 act had in it a provision identical with the provision under discussion, found in the 1921 act. But the 1921 act, in Section 1400 thereof, specifically repealed the 1918 act. There was no saving clause except as to the assessment and collection of taxes which had accrued

under the Revenue Act of 1918. Nothing had accrued, as far as these trusts were concerned, at the time the 1918 statute was repealed by the 1921 statute. Therefore there was no tax preserved by that saving clause.

The 1921 statute, Section 402 thereof, provided in subparagraph *c* for the taxing, in effect, of transfers "intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act)". This clause, when taken in conjunction with the repealing clause, Section 1400 above referred to, demonstrates beyond any question that Congress intended to tax trusts made *prior to* 1921 *under the* 1921 act, and not under any prior act, or not by any saving clause as to any prior act.

And this court held in the *Coolidge Case* (p. 539) that that intention of Congress was clear beyond any dispute.

But that intention was nullified when this court in the *Coolidge Case* (p. 539) declared that provision unconstitutional.

And that intention, having been nullified the prior statute or 1918 act was not thereby revived. Nor can another intention be read into the minds of Congress or into the act itself to tax such prior trusts under the statutes that were in force at the time those trusts were made.

The question raised by counsel for the petitioner (p. 12 of the petition for a writ of certiorari, question (3)), does not meet this proposition. The question is not whether Congress *had the power* to tax a trust intended to take effect in possession or enjoyment at or after the death of the decedent, and made while the prior statute was in force. But the question is whether Congress did

keep the former statute alive and preserve the tax imposed by the former act. It is clear that it did not, and such was not its intention.

See:

People v. *Carpenter*, 274 Ill. 103.

The Board of Tax Appeals in two well-considered decisions has held, since the rendition of the Coolidge decision by this court, that the trusts made prior to the passage of the act in force at the time of the death of the decedent were not taxable, even though within the language of the statute and even though they were made while a prior act was in force containing the same language.

Duggan Estate, 8 B. T. A. 482, 1927 Commerce Clearing House 3910.

Alsop Executor v. *Commissioner*, 7 B. T. A. 848, 1927 Commerce Clearing House 3376.

II.

THE FACT THAT POWERS OF REVOCATION ARE CONTAINED IN THE TRUSTS OF 1903 AND 1910 DOES NOT FURNISH A VALID BASIS FOR ANY DISTINCTION BETWEEN THESE TRUSTS INVOLVED IN THE COOLIDGE CASE.

Whether a deed of trust has in it a power of revocation or not, it is a completed transaction as of the time when it was made.

A deed of trust even containing such a power passes the title and possession of the property out of the settlor.

The right to revoke is not a property right in the settlor, and therefore there was nothing that passed

from him at his death by reason of such power of revocation.

Jones v. *Clifton*, 101 U. S. 225.

It has also been repeatedly held that the mere presence of a power of revocation in a trust indenture does not bring the trust within the language "to take effect in possession or enjoyment at or after death."

Cochran's Estate, 190 N. Y. Supp. 895.

In re Carnegie's Estate, 196 N. Y. Supp. 502 (Affd. 142 N. E. 266).

Masury Case, 51 N. Y. Supp. 331 (Affd. by N. Y. 1127).

Miller Estate, 236 N. Y. 290; 140 N. E. 701; 198 N. Y. Supp. 202.

In re Dolan's Estate (Pa.), 124 Atl. 176.

Newhall v. *Casey*, 18 Fed. (2nd) 447, 1927 C. C. H. 7552.

Commonwealth v. *McCauley's Executor* (Ky.), 179 S. W. 411.

Stark, Executor of Schmidlap v. *U. S.* ——— Fed (2d) ———.

1927 Commerce Clearing House, 7712. (Former opinion 14 Fed. (2nd) 616.

Hill v. *Nichols*, 18 Fed. (224) 139.

It is respectfully submitted that every case that comes before the Department of Internal Revenue need not, in order to be disposed of, have its exact counterpart in this court. Similarity in general principles ought to be sufficient as a guide to a decision. The two cases above referred to, particularly in view of the others preceding them, have amply construed the statute in question, and have determined the general principles governing this case, without the necessity of any review by

this court. Certainly it would seem from the decisions above cited which have been decided since the Coolidge and Shukert Cases were decided that neither the District Court, nor the Circuit Courts of Appeal, nor the Board of Tax Appeals, have had any difficulty in construing that statute in the light of those cases.

Therefore, we submit that the petition should be denied.

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